

FILED  
U. S. DISTRICT COURT  
DISTRICT OF NEBRASKA  
2014 DEC -8 PM 3: 13

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, )  
 )  
v. )  
 )  
JAMES A. LAPHEN, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 4:14 cr 3133

**PLEA AGREEMENT**

IT IS HEREBY AGREED between the United States of America, through its undersigned counsel, William J. Stellmach, Acting Chief, United States Department of Justice, Criminal Division, Fraud Section, Henry Van Dyck, and L. Rush Atkinson, Trial Attorneys, Criminal Division, Fraud Section, and Defendant, JAMES A. LAPHEN, and Edward G. Warin, counsel for Defendant, as follows:

I

**CHARGES**

Defendant agrees to plead guilty to a two-count Information charging Defendant with conspiring to (a) commit mail fraud affecting a financial institution, (b) commit wire fraud affecting a financial institution, (c) commit securities fraud, and (d) make false entries in a bank's books, reports, or statements, all in violation of Title 18, United States Code, Section 371 (Count 1), and with knowingly and willfully making materially false, fictitious, or

fraudulent statements or representations in a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, in violation of Title 18, United States Code, Section 1001 (Count 2).

II

NATURE OF THE OFFENSES

A. ELEMENTS EXPLAINED

Defendant understands that Count 1 to which Defendant is pleading guilty has the following elements:

1. *First*, there was an agreement by two or more persons to accomplish an unlawful plan;
2. *Second*, Defendant voluntarily and willfully joined in the agreement, either at the time it was first reached or at some later time while it was still in effect;
3. *Third*, at the time Defendant joined in the agreement, Defendant knew the purpose of the agreement; and
4. *Fourth*, while the agreement was in effect, a person or persons who had joined in the agreement knowingly did one or more acts for the purpose of carrying out or carrying forward the agreement.

Similarly, Defendant understands that Count 2 to which Defendant is pleading guilty has the following elements:

1. *First*, Defendant knowingly and willfully made the statement;
2. *Second*, the statement was false;
3. *Third*, the statement concerned a material fact;
4. *Fourth*, the statement was made about a matter within the jurisdiction of an agency of the United States; and
5. *Fifth*, Defendant knew the statement was untrue when it was made.

Defendant also understands that, with respect to Count 2, the false, fictitious, or fraudulent statement or representation was made to the Securities & Exchange Commission ("SEC").

B. ELEMENTS UNDERSTOOD AND ADMITTED - FACTUAL BASIS

Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crimes charged, and admits that there is a factual basis for this guilty plea. The parties agree that the facts set forth below and the facts alleged in the Information are true and may be considered as "relevant conduct" under U.S.S.G. § 1B1.3 and as the nature and circumstances of the offense under 18 U.S.C. § 3553(a)(1).

The parties agree that all information known by the office of the United States Pretrial Services may be used by the Probation Office in submitting its presentence report, and may be disclosed to the court for purposes of sentencing.

C. FACTUAL BASIS

The following facts are true and undisputed.

1. Defendant admits the facts set forth below and contained in the Information and is pleading guilty because Defendant is guilty of the charged offenses.

2. During all relevant times Defendant was an officer of TierOne Bank, a wholly owned subsidiary of TierOne Corporation, a publicly traded company (collectively "TierOne"). TierOne was regulated by the SEC and by the Office of Thrift Supervision ("OTS"). From in or around April 2002 to in or around March 2010, Defendant was the President and Chief Operating Officer of TierOne. On or about March 30, 2010, Defendant was appointed by the Board of Directors as acting Chief Executive Officer of TierOne.

3. From in or around at least 2008 and continuing through in or around at least June 2010, Defendant conspired with senior executives and other employees at TierOne to conceal TierOne's true financial condition from TierOne's shareholders, regulators, external auditors, and the investing public, including the value of the losses Defendant and his co-conspirators estimated TierOne would incur in its loan portfolio and its real estate portfolio, in order to: (a) forestall adverse regulatory action against TierOne; (b) maintain and influence the market price of TierOne's stock; and (c) enrich the conspirators through the receipt of compensation and other benefits from TierOne.

4. Defendant and his co-conspirators purposefully misstated the value of TierOne's loan and real estate portfolios by, among other means, (a) using outdated appraisals on collateral and real estate owned property; (b) understating the risk of certain loans; (c)

delaying the seeking of new appraisals in order to conceal the current value of the loan collateral and real estate owned property; (d) rejecting new appraisals of loan collateral when those appraisals would have caused TierOne to increase its Loan Loss Allowance; and (e) restructuring loan terms to disguise borrowers' inability to make timely interest and principal payments.

5. Defendant and his co-conspirators made misrepresentations, and caused others to make misrepresentations, to TierOne's shareholders, regulators, external auditors, and the investing public about TierOne's financial condition, by (a) submitting and filing reports, records, and memoranda that provided materially false, misleading, and fraudulent descriptions of the value of various bank loans and the value of collateral securing those loans; (b) concealing an internal analysis prepared by Defendant's co-conspirators that would have required TierOne to increase its Loan Loss Allowance; (c) concealing the existence of recent appraisals of collateral; and (d) concealing material information relating to the value of TierOne's real estate portfolio.

6. In furtherance of the conspiracy and to achieve its objects and purposes, at least one of the conspirators committed and caused to be committed, in the District of Nebraska and elsewhere, at least one of the following overt acts, among others:

7. In or around July 2009, Defendant and others caused TierOne's financial statements to be manipulated to make it appear that TierOne had met or exceeded the 8.5% minimum core capital ratio mandated by the OTS.

8. On or about July 30, 2009, Defendant and others caused TierOne to file a Thrift Financial Report with the OTS that misrepresented TierOne's financial condition and performance.

9. On or about August 10, 2009, Defendant and others caused TierOne to file a SEC Form 10-Q for the quarter ending June 30, 2009 that misrepresented TierOne's financial condition and performance.

10. On or about October 11, 2009, Defendant and others caused a report to be submitted to the OTS that contained false and misleading statements about TierOne's analysis of losses in TierOne's loan portfolio.

11. In all of the aforementioned actions, Defendant acted knowingly and with the intent to defraud or deceive.

### III

#### PENALTIES

Defendant understands that the crimes to which Defendant is pleading guilty in Count One and Count Two of the Information independently carry the following penalties:

1. A maximum 5 years in prison;

2. A maximum \$250,000 fine;
3. A mandatory special assessment of \$100;
4. A term of supervised release of not more than 3 years. Defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring Defendant to serve in prison all or part of the term of supervised release; and
5. Possible ineligibility for certain Federal benefits.

#### IV

#### SCOPE OF AGREEMENT

This plea agreement is limited to the United States Attorney's Office for the District of Nebraska and the Fraud Section of the Criminal Division of the United States Department of Justice, and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities.

## V

PARTIES' SENTENCING RECOMMENDATIONSA. SENTENCING GUIDELINE CALCULATION

The parties agree that the following sentencing guidelines apply to Defendant's case:

Base offense level	7	2B1.1(a)
Loss	24	2B1.1(b)(1)(M) (more than \$50,000,000)
More than 250 victims	6	2B1.1(b)(2)(C)
Sophisticated means	2	2B1.1(b)(10)
Jeopardizing safety & soundness of a financial institution	2	2B1.1(b)(16)(B)
Officer of public company	4	2B1.1(b)(19)(A)
Organizer or leader	4	3B1.1(a)
Acceptance	-3	3E1.1(b)
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Total Offense Level	46	

Criminal History Category I

B. ACCEPTANCE OF RESPONSIBILITY

Notwithstanding the sentencing guideline agreement in paragraph A above, the United States will not recommend the adjustment for Acceptance of Responsibility if Defendant is in breach of the plea agreement under Section VII, herein.

C. RESTITUTION

Defendant acknowledges restitution may be ordered as a part of the sentence in this case, and Defendant agrees the Court may order restitution to all victims, not just those pertaining to the counts of conviction. Defendant understands that a schedule of payments is

merely a minimum schedule of payments and not the only method, nor a limitation on methods, available to the United States to enforce the judgment. If incarcerated, Defendant agrees to participate in the Bureau of Prisons Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a payment schedule. Pursuant to 18 U.S.C. § 3613, whatever monetary penalties are imposed by the Court will be due immediately and subject to immediate enforcement by the United States as provided for in Section 3613. Defendant agrees to provide all Defendant's financial information to the United States and the Probation Officer, and agrees, if requested, to participate in a pre-sentencing debtor exam.

D. FORFEITURE

Defendant understands that the forfeiture of assets is part of the sentence that may be imposed in this case. Defendant agrees to forfeit all interests in any fraud-related asset that Defendant owns or over which Defendant exercises control, directly or indirectly, as well as any property that is traceable to, derived from, fungible with, or a substitute for property that constitutes the proceeds of his offenses, including but not limited to a money judgment order. Defendant further agrees to waive all interest in the asset(s) in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. Defendant agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the

charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment.

Defendant further agrees to waive all constitutional and statutory challenges to forfeiture in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this plea agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant also waives any failure by the Court to advise the defendant of any applicable forfeiture at the time the guilty plea is accepted as required by Rule 11(b)(1)(J). Defendant agrees to take all steps as requested by the United States to pass clear title to forfeitable assets to the United States and to testify truthfully in any judicial forfeiture proceeding. Defendant understands and agrees that all property covered by this agreement is subject to forfeiture as proceeds of illegal conduct, property involved in illegal conduct giving rise to forfeiture, or substitute assets for property otherwise subject to forfeiture.

E. ADJUSTMENTS, DEPARTURES & REDUCTIONS UNDER 18 U.S.C. § 3553

The parties agree the guideline calculation in paragraph A above is correct. Defendant may, however, request or recommend a sentence below the guideline range in this case under the factors set forth in 18 U.S.C. § 3553. The United States may oppose any such downward adjustments, departures, and sentence reductions.

VI

**WAIVER OF APPEAL AND COLLATERAL ATTACK**

Defendant hereby knowingly and expressly waives any and all rights to appeal Defendant's conviction, including all motions, defenses, and objections which Defendant could assert to the charges or to the Court's entry of Judgment against Defendant.

Defendant further knowingly and expressly waives any and all rights to contest Defendant's conviction in any post-conviction proceedings, including any proceedings under 28 U.S.C. § 2255, except:

(a) The right to timely challenge Defendant's conviction and the sentence of the Court should an Appellate Court later find that the charge to which Defendant is agreeing to plead guilty fails to state a crime.

(b) The right to seek post conviction relief based on ineffective assistance of counsel, or prosecutorial misconduct, if the grounds for such claim could not have been known by Defendant at the time Defendant enters the guilty plea contemplated by this plea agreement.

VII

**BREACH OF AGREEMENT**

The following acts by Defendant will constitute a breach of the plea agreement:

1. Failing to admit a complete factual basis for the guilty plea at the time it is entered, or

2. Denying involvement in the offense, giving conflicting statements about that involvement, or being untruthful with the court, probation officer, or the government, or
3. Failing to appear in court, or
4. Engaging in additional criminal conduct, or
5. Attempting to withdraw the guilty plea, or
6. Refusing to abide by any lawful court order, or
7. Contesting or assisting any third party in contesting the forfeiture of property seized or forfeited in connection with this case.

If Defendant breaches this plea agreement, at any time, in any way, including, but not limited to, appealing or collaterally attacking the conviction, the United States may prosecute Defendant for any counts, including those with mandatory minimum sentences, dismissed or not charged pursuant to this plea agreement. In any such breach by Defendant and subsequent prosecution, Defendant waives any protections afforded by Section 1B1.8(a) of the Sentencing Guidelines, Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, and the United States will be free to use against the defendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to this plea agreement, including offering into evidence or otherwise using any factual admissions made by Defendant pursuant to this plea agreement. In any such breach by Defendant and

subsequent prosecution, the government may also use any statement made by Defendant pursuant to a proffer letter.

## VIII

### CIVIL PROCEEDINGS

The United States may use against Defendant any disclosure(s) Defendant has made pursuant to this agreement in any civil proceeding. Nothing contained in this agreement shall in any manner limit Defendant's civil liability which may otherwise be found to exist, or in any manner limit or prevent the United States from pursuing any applicable civil remedy, including but not limited to remedies regarding asset forfeiture and/or taxation.

## IX

### WITHDRAWAL OF GUILTY PLEA

Once accepted by the court, Defendant shall not be allowed to withdraw his guilty plea. The court is not bound to any agreement by the parties as to sentencing except as provided by statute. By signing this agreement, Defendant waives the right to withdraw Defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d). Furthermore, Defendant understands that if the court rejects the plea agreement, whether or not Defendant withdraws the guilty plea, the United States is relieved of any obligation it had under the agreement and Defendant shall be subject to prosecution for any federal, state, or local crime(s) which this agreement otherwise anticipated would be dismissed or not

prosecuted. This agreement may be withdrawn by the United States at any time prior to its being signed by all parties.

X

**MODIFICATION OF AGREEMENT MUST BE IN WRITING**

The agreement, when signed, ends all plea discussions. No promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless in writing and signed by all parties.

XI

DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT

By signing this agreement, Defendant certifies that Defendant has read it. Defendant has discussed the terms of this agreement with defense counsel and fully understands its meaning and effect. Defendant has had sufficient time to consider the plea agreement.

XII

DEFENDANT SATISFIED WITH COUNSEL

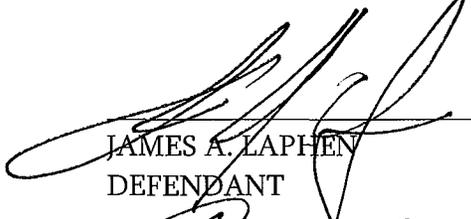
Defendant has consulted with counsel and is satisfied with counsel's representation.

UNITED STATES OF AMERICA  
WILLIAM J. STELLMACH  
ACTING CHIEF  
FRAUD SECTION, CRIMINAL DIVISION  
UNITED STATES DEPARTMENT OF JUSTICE

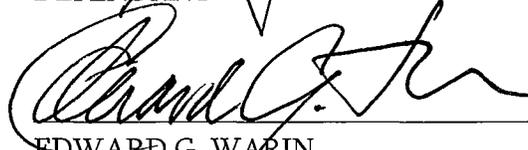
12/8/14  
Date

By:   
HENRY VAN DYCK  
L. RUSH ATKINSON  
CRIMINAL DIVISION, FRAUD SECTION  
UNITED STATES DEPARTMENT OF JUSTICE

12-8-14  
Date

  
JAMES A. LAPHEN  
DEFENDANT

12-8-14  
Date

  
EDWARD G. WARIN  
COUNSEL FOR DEFENDANT